

14303 (0901.68198)

PATENT APPLICATION

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Richard J. Ernst
Serial No.:	10/687,451
Conf. No.:	8743
Filed:	October 16, 2003
For:	ROD HANGER FOR SECURING A ROD TO A SUBSTRATE
Art Unit:	3632
Examiner:	Epps, Todd Michael

APPELLANTS' BRIEF ON APPEAL UNDER 37 C.F.R. § 1.192

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is in support of Applicants' Notice of Appeal dated September 24, 2009 from the Final Rejection dated June 24, 2009.

### **REAL PARTY IN INTEREST**

The real party in interest in this case is Illinois Tool Works Inc., 3600 West Lake Avenue, Glenview, Illinois, 60025.

### **RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences related to this application.

### **STATUS OF CLAIMS**

Claims 1, 2, 8, 12, 26, and 32-39 are pending. Claim 39 is withdrawn. All other claims have been cancelled. No claims have been allowed. Claims 1, 2, 8, 12, 26, and 32-38 stand rejected in a final rejection mailed June 24, 2009. The rejections of claims 32, 35, 36, 37 and 38 are appealed.

### **STATUS OF AMENDMENTS**

Amendment H was filed on February 27, 2009, and was the last amendment filed. All amendments have been entered and considered. No amendments were filed subsequent to the final rejection mailed June 24, 2009.

## **SUMMARY OF CLAIMED SUBJECT MATTER**

The rejections of claims 32 and 35-38 are appealed. Claims 35 and 36 are independent. Claim 32 depends from claim 35. Claim 37 depends from claim 1, and claim 38 depends from claim 36. A concise summary of these claims follows.

Referring now to claim 35, a rod hanger 10 for attachment with a fastener 40 to a substrate 14 comprises a mounting portion 28 having a planar top surface 34 configured for engaging the substrate 14 that the fastener is driven into (page 4, lines 17-22) (Fig. 1). A rod receiving portion 16 is configured for threadably receiving the rod 12 and a connecting element 26 is configured for vertically displacing the mounting portion 28 from the rod receiving portion 16. (page 4, lines 13-19) (Fig. 1). At least four anti-rotation elements 42 are located on the mounting portion generally planar top surface 34. (page 5, lines 15-18) (Figs. 1, 3, 5, 9, 13). The anti-rotation elements 42 are configured for counteracting a moment acting upon the rod hanger 10 as the rod 12 is threadably received by the rod receiving portion 16. (page 5, lines 15-20). The anti-rotation members 42 are provided with a resilient cover 54 formed of a rubber or polymer. (page 7, lines 3-5) (Figs. 3-4). The resilient cover 54 is attached to the anti-rotation elements 42 using a chemical adhesive or by thermoforming, and the cover 54 may extend fully over the anti-rotation elements 42. (page 7, lines 5-8) (Figs. 3-4).

Referring now to claim 36, a rod hanger 10 is provided for attachment with a fastener 40 to a substrate 14 when the fastener is driven into the substrate and frictionally held in the substrate (page 4, lines 17-22) (Fig. 1). The rod hanger 10 is configured for

securing a rod 12 to the substrate 14 and comprises a mounting portion 28 having a generally planar top surface 34 configured for engaging the substrate 14 into which the fastener is driven and that frictionally holds the fastener 40 (page 5, lines 14-16) (Fig. 1). A rod receiving portion 16 is configured for threadably receiving the rod 12 (page 4, line 14) (Fig. 1). A connecting element 26 vertically displaces the mounting portion 28 and the rod receiving portion 16. (page 4, lines 18-20) (Fig. 1).

At least four anti-rotation elements 42 are located on the mounting portion generally planar top surface 34 and configured for engaging the substrate 14 into which the fastener 40 is driven and for counteracting a moment acting upon the rod hanger 10 as the rod 12 is threadably received by the rod receiving portion 16. (page 5, lines 15-20) (Figs. 1, 3, 5, 9, 13). A resilient cover 54, 56 is provided for enhancing the adhesion of the mounting portion 28 with the substrate 14. (page 7, lines 3-5) (Figs. 3-4).

Referring now to claim 32, it depends from claim 36 and further recites that the resilient cover 54, 56 is formed of a polymer and extends fully over the anti-rotation members 42 and is secured to the anti-rotation members 42 by one of a chemical adhesive or thermoforming. (lines 5-8, page 7) (Figs. 3-4).

Referring to claim 37, a rod hanger 10 for attachment to a substrate 14 comprises a mounting portion 28 (page 4, lines 18-22) (Fig. 1) having a hole 38 for engaging a fastener 40 that is driven into the substrate 14 (page 5, lines 14-16) (Fig. 1). A rod receiving portion 16 is configured to threadably engage the rod 12 (page 4, lines 13-16) (Fig. 1). A connecting element 26 vertically displaces the mounting portion 28 from the rod

receiving portion 16. (page 4, lines 16-18) (Fig. 1)

At least four anti-rotation elements 42 are located on a mounting portion generally planar top surface 34 (page 5, lines 15-18) (Figs. 1, 3, 5, 9, 13). The anti-rotation elements 42 are configured for engaging the substrate 14 that the fastener 40 is driven into and for counteracting a moment acting upon the rod hanger 10 as the rod is threadably received by the rod receiving portion 16 (page 5, lines 15-20). The anti-rotation elements 42 have a generally hemisphered shape (Figs. 1, 3, 4). Referring to claim 38, it depends from claim 36 and further recites that anti-rotation elements 42 have a generally hemisphered shape (Figs. 1, 3, 4).

### **GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

The rejections of independent claims 35 and 36, and the rejection of dependent claims 32, 37 and 38 are to be reviewed on appeal. Claims 32, 35, 36 and 38 stand rejected under 35 U.S.C. §103(a) as obvious over U.S. Patent No. 5,758,465 to Logue (“the ‘465 patent”) in view of U.S. Patent No. 5,546,723 to Jones (“the ‘723 patent”), and in further view of U.S. Patent No. 3,788,185 to Gutshall (“the ‘185 patent”). Claim 37 stands rejected as obvious under 35 U.S.C. §103(a) over the ‘465 patent in view of the ‘723 patent, and in further view of U.S. Patent No. 6,866,458 to Farrell et al. (“the ‘458 patent”).

## **ARGUMENT**

The present invention provides a rod hanger with anti-rotation elements for reducing the effect of rotational moments encountered during or after installation. As explained in the Background of the Invention section of the present application, prior art rod hangers were subject to undesirable rotation about their mounting position on a substrate as a result of rotational moments acting on the hanger when a rod was threaded into the hanger. Thus readjustment of the hanger was sometimes required after installation. The present invention addresses this and other problems by providing anti-rotation elements in a particular configuration. In some embodiments a resilient cover is provided over the anti-rotation elements for enhancing adhesion with the substrate.

The Examiner concedes that the present invention is novel, but rejected claims 32, 35, 36 and 38 as obvious over the '465 patent in view of the '723 patent, and in further view of the '185 patent. The '465 patent describes a rod hanger of the prior art, without any anti-rotation elements. The '723 patent describes a wood sill reinforcement plate having gripper prongs. The '185 patent describes a metal screw that may be used with a resilient washer. The Examiner rejected claim 37 as obvious over the '465 patent in view of the '723 patent, and in further view of the '458 patent. The '458 patent is alleged to disclose a truncated cone shaped anti-rotation element.

Issues on this appeal include:

- I. Whether the resilient washer disclosed by the '185 patent can support the obviousness rejections of claims 32, 35, 36 and 38.**
- II. Whether the sharp pointed gripper prongs of the '723 patent can properly support a rejection of claim 37.**
- III. Whether Claim 37 complies with 35 U.S.C. §112**

**I. THE OBVIOUSNESS REJECTION OF CLAIMS 32, 35 AND 36 IS IMPROPER AND MUST BE WITHDRAWN SINCE NO PRIMA FACIE CASE OF OBVIOUSNESS HAS BEEN MADE**

It is submitted that no prima facie case of obviousness has been put forth with regards to claims 32, 35 and 36. These claims stand rejected as obvious over the '465 patent in view of the '723 patent and in further view of the '185 patent. Claims 35 and 36 are independent, and claim 32 depends from claim 36. Each of claims 35 and 36 require at least four anti-rotation elements. The '723 and '465 patents are cited in combination to disclose these elements. Each of claims 32, 35 and 36 additionally require a resilient cover extending over the anti-rotation elements:

- Claim 35: a resilient cover formed of a polymer extending over the anti-rotation elements, said resilient cover secured to said anti-rotation members by one of a chemical adhesive or thermoforming;
- Claim 36: a resilient cover for enhancing the adhesion of the mounting portion with the substrate;
- Claim 32: the resilient cover (of claim 36) is formed of a polymer and extends fully over said anti-rotation member, and is secured to said anti-rotation members by one of a chemical adhesive or thermoforming.

The Office Action admits that the '723 and '465 patents fail to disclose these elements, but instead cites the '185 patent for this. It is submitted that relying on the '185 patent for this teaching is improper for several reasons.

**I.A NO PRIMA FACIE CASE OF OBVIOUSNESS HAS BEEN PUT FORTH SINCE THE '185 PATENT FAILS TO DISCLOSE OR SUGGEST A RESILIENT COVER BUT INSTEAD TEACHES A RESILIENT SEAL WASHER**

It is submitted that the Examiner has misinterpreted the '185 patent and/or the invention of claims 32, 35 and 36. In particular, it is submitted that the '185 patent does not teach or suggest a resilient cover as claimed but instead teaches a very different seal washer., that the Examiner's rejection is directed to elements that are not claimed, and therefore that no prima facie case of obviousness has been put forth.

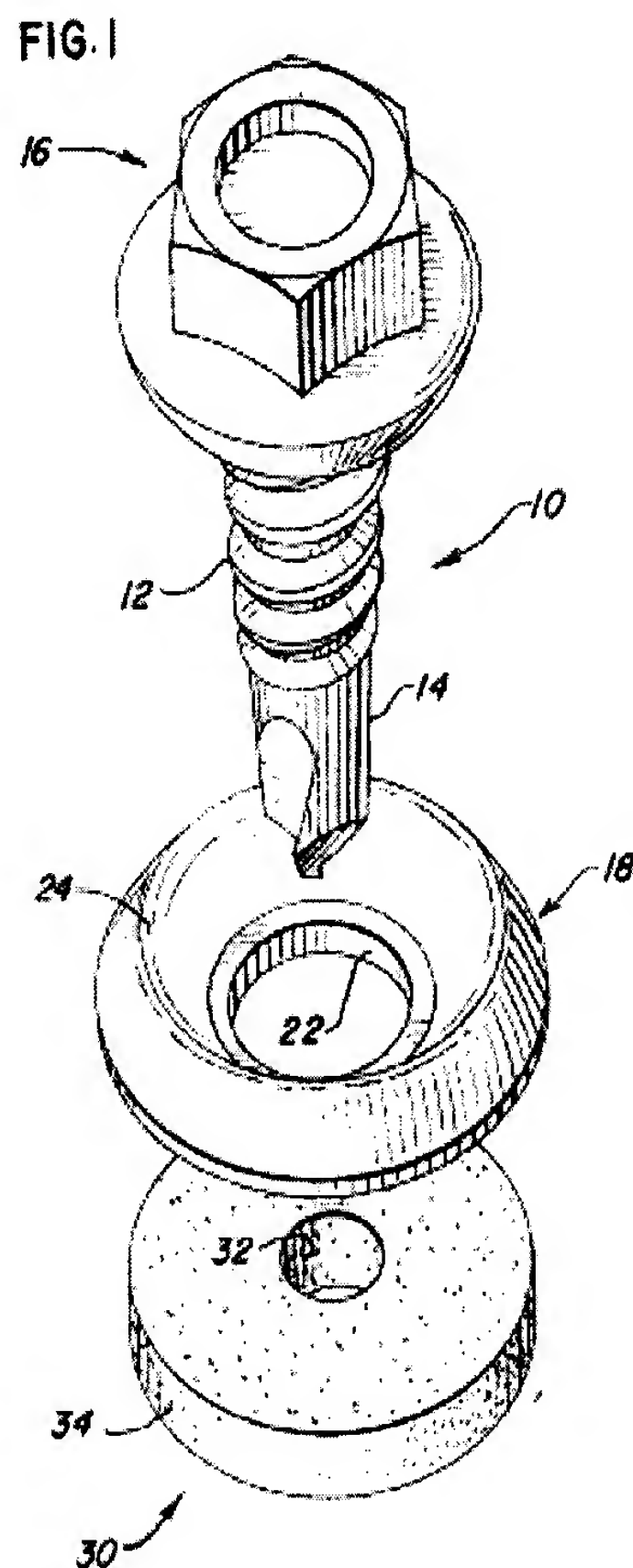
In rejecting these claims, the Final Action states "Nevertheless, Gutshall '185 teaches wherein a mounting is secured by a resilient cover."Page. 6 (emphasis added). Importantly, however, the corresponding claims do not require that a "mounting is secured by a resilient cover" as the Final Action cites the '185 patent as disclosing. The claims do not recite a "mounting" or anything else that is "secured by a resilient cover." Instead, claims 32 and 35 recite a resilient cover secured to anti-rotation elements. This mis-statement by the Examiner suggests that the '185 patent may have been mis-applied and that no prima facie case of obviousness exists.

Putting this aside for the moment, it is additionally submitted that the '185 patent fails to disclose the claimed resilient cover extending over anti-rotation elements on a mounting portion. This is another reason that no prima facie case of obviousness has been



made. Instead, the '185 patent discloses a fastener such as metal screw 16, a separate rigid washer 18, and a separate resilient seal washer 30 which may be made of rubber or the like.

Col. 5, lines 4-15; Col. 5, lines 26-35; Fig. 1:



As best understood, the subject invention of the '185 patent operates so that the resilient washer 30 is deformed to seal any openings between the rigid washer and the fastener.

#### Summary of the Invention.

The seal washer 30 of the '185 patent is not a "resilient cover" that extends over anti-rotation elements as claimed and as the Final Action alleges it to be, but is instead a

“seal washer.” It serves a very different purpose than the claimed resilient anti-rotation element cover – the washer acts as a seal between a fastener shaft and a rigid washer: “The thickness and diameter of the resilient washer is selected so that sufficient resilient material is available to fill critical voids and provide the desired seals ... The aperture defined by inner periphery 32 is sized so that when the resilient washer 30 is peripherally forced up along shank 10, the natural stresses force it into the aforementioned inverted frustoconical disposition shown in FIG. 2. ....” The ‘185 patent, col. 5, line 27 – 54.

No prima facie case of obviousness has therefore been put forth since the ‘185 patent fails to teach a resilient cover as claimed by claims 32, 35 and 36 but instead discloses a very different seal washer.

**I.B NO PRIMA FACIE CASE OF OBVIOUSNESS HAS BEEN MADE SINCE NO EVIDENCE HAS BEEN PUT FORTH SHOWING A MOTIVATION TO COMBINE THE ‘185 PATENT TEACHINGS WITH THOSE OF THE ‘723 AND ‘465 PATENTS**

Accepting only for the sake of argument that the seal washer 30 of the ‘185 patent may be considered to be a “resilient cover” as claimed by claims 32, 35 and 36, it is further submitted that no prima facie case of obviousness has been made since there has been no objective evidence put forth showing that one considering any of the ‘465 or ‘723 patents would look to modify their teaching using the seal washer 30 of the ‘185 patent. The MPEP states that a prima facie case of obviousness requires, among other things, objective evidence which establishes a teaching to modify the prior art reference components to construct a device substantially equivalent to that claimed. This generally encompasses two sub-steps: (1) identifying objective evidence teaching how to modify the prior art components; and (2)

identifying objective evidence teaching how to combine the modified individual components. MPEP §§2141, 2143.

The Examiner must set forth a rationale, supported by objective evidence (under a preponderance of the evidence standard) that the prior art at the time of invention provided a teaching to modify the prior art reference components to achieve the claimed structure. *Id.* The preferable evidence is an express teaching to modify/combine within the properly defined sources of prior art. In the absence of such express teaching, an Examiner may attempt to establish a rationale to support a finding of such teaching based upon, express teachings taken from the prior art. MPEP § 2144; *In re Dembiczak*, 50 U.S.P.Q. 2d 1614 (Fed. Cir. 1999).

This has been referred to as the “teaching/suggestion/motivation test” (TSM). Although a rigid application of TSM was rejected in *KSR Int’l. Co. v. Teleflex, Inc.*, 82 USPQ2d 1385 (2007), the test was not discarded. The Court only required consideration of the general knowledge of those skilled in the art and other factors, using a common sense approach, but also warned against overly broad findings of obviousness:

... a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. ... (I)t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what ... is already known.

*Id.*, at 1741. The MPEP also warns against overly broad findings of obviousness based on

the impermissible use of hindsight, and sets forth at least two rules that ensure against such rejections. The first is that it is impermissible to use hindsight gained from considering the application:

... the Examiner must step backward in time and into the shoes worn by the hypothetical “person of ordinary skill in the art” when the invention was ... (made) ... The tendency to resort to “hindsight” based upon an Applicant’s disclosure is often difficult to avoid due to the very nature of the examination process.

MPEP §2142. Thus, if the only objective evidence of such teaching to modify and/or combine is found in applicant’s disclosure, no evidence of such teaching exists.

The second rule requires that an alleged advantage or beneficial result that would have been produced by a modification and/or combination of the prior art reference components must be found in objectively verifiable teachings of the prior art. MPEP §2144. Thus, to avoid the use of impermissible hindsight, these MPEP rules make clear that absent objective evidence sufficient to satisfy the preponderance of the evidence standard, no teaching of such modification and/or combination exists.

The MPEP further specifies that the basis for the alleged motivation to modify or combine should be made explicit, and that an Examiner cannot rely on conclusory statements alone:

The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that ‘rejections on obviousness cannot be sustained with mere conclusory

statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.’ In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

MPEP 2142 (emphasis added).

In consideration of the above, it is submitted that the obviousness rejections of claims 32, 35 and 36 are improper. There has been no objective evidence explicitly put forth suggesting that one considering the ‘465 patent in view of the ‘723 patent would have any expectation of success or would otherwise be led to trying to combine these teachings with a seal washer 30 as taught by the ‘185 patent. It is further submitted that the obviousness rejection can only be made through the impermissible use of hindsight gained after considering the present application.

The Examiner has failed to satisfy the standards required by the MPEP and caselaw regarding explicitly putting forth objective evidence supporting his contention that it would be obvious to modify the teachings of the ‘465 and ‘723 patents with the seal washer of the ‘185 patent. As best understood, the only evidence put forth by the Examiner is found on page 6 of the Final Action: “Nevertheless, Gutshall ‘185 teaches wherein a mounting is secured by a resilient cover. It would have been obvious ... to include the resilient cover on each anti-rotation element as taught by Gutshall ‘185 wherein doing so would provide thereof for a protective coating on the anti-rotation member” Page. 6 (emphasis added). Importantly, however, no discussion, teaching, or mention of a “protective coating” is made or cited in any of the present application or the cited references. The present application

teaches that the resilient cover is useful to enhance the adhesion of the mounting portion 28 to the substrate 14, not to provide a “protective coating.” Page 7, lines 4-6.

When directly responding to the Applicant’s argument that no objective evidence has been put forth on the issue of a motivation to combine, the Final Action also states that “In this case, applicant will see that the references of Logue ‘465, Jones ‘723 and Gutshall ‘185 are presented in the above office action, and are properly rejected since they all have a close tie to a fastener connection.” It is submitted that this is simply a conclusory statement that does not satisfy the requirement that objective evidence be explicitly put forth.

The Examiner’s alleged evidence of a motivation to combine / modify fails to satisfy the required explicitly stated objective evidence standard for these and other reasons. This is another basis on which the obviousness rejections of claims 32, 35 and 36 are improper and must be withdrawn.

#### **I.C THE REJECTION CITING THE ‘185 PATENT IS IMPROPER FOR OTHER REASONS**

The rejection over the ‘185 patent is improper for the reasons set out above. It is improper for other reasons as well. It is noted that the Office Action and the subsequent Final Action failed to cite any particular portion of the ‘185 patent by column, line, element number or Figure. Such practice is discouraged by 706.02(j). It is further noted that despite applicant’s express request for clarification on this issue in Amendment H, no further detail was provided in the Final Action regarding what particular portion(s) of the ‘185 patent were relied upon. No column, lines, figures or elements are identified. Repeated rejections that

lack specificity have added to the difficulty in understanding and addressing the rejection over the '185 patent. This is particularly disappointing given the long (6 year +) and costly prosecution of this application.

**II. THE SHARP POINTED GRIPPER PRONGS OF THE '723 PATENT DO NOT HAVE THE REQUIRED HEMISPHERICAL SHAPE OF THE ANTI-ROTATION ELEMENTS OF CLAIMS 37 AND 38, AND IN FACT TEACH AWAY FROM THIS CLAIMED STRUCTURE.**

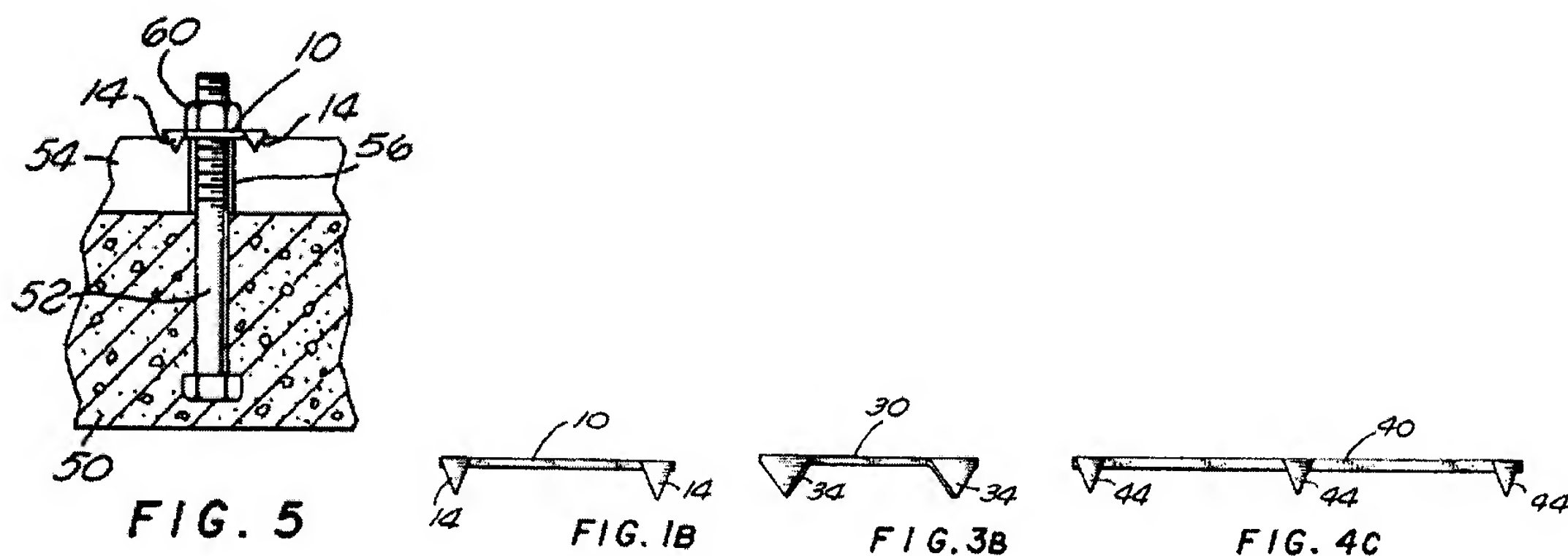
As noted above, the MPEP states that a prima facie case of obviousness requires, among other things, objective evidence which establishes a teaching to modify the prior art reference components to construct a device substantially equivalent to that claimed. MPEP §§2141, 2143. The Examiner must set forth a rationale, supported by objective evidence that the prior art at the time of invention provided a teaching to modify the prior art reference components to achieve the claim at issue. *Id.* The MPEP also warns against overly broad findings of obviousness based on the impermissible use of hindsight, and that it is impermissible to use hindsight gained from considering the application. *Id.*

The MPEP and legal precedent also make clear that there can be no motivation or suggestion to combine the references: "If a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." MPEP 2143.01.V (citing *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984)). It is improper to combine references where the references teach away from their combination. *In re Grasselli*, 713 F.2d 731, 743, (Fed. Cir. 1983) see also MPEP 2141.02.



Considering the above, the obviousness rejections of claims 37 and 38 are improper. Claim 37 depends from claim 1 and claim 38 from independent claim 36, and each recite that the anti-rotation elements have a generally hemispherical shape. Both are rejected as obvious over the '723 patent in view of the '465 patent (claim 38 in further view of the '185 patent). The Final Action admits the claimed hemispherical shape anti-rotation element structure of these claims is not disclosed by the '723 patent, but suggests that it represents only an obvious variation in shape over the disclosure. It is submitted that this is not correct, and that the '723 patent not only fails to teach these shapes but further teaches away from them.

The '723 patent teaches that its gripper prongs 14 are "... formed with a sharp point so as to pass into and grip the wood sill ..." Col. 2, lines 58-59 (emphasis added). Each of FIGS. 5, 1B, 3B, 4C, and others consistently illustrate gripper prongs 14, 34 and 44 (respectively) as having thin shapes with sharp points:



The '723 patent further teaches that the gripper prong sharp points are important to the intended purpose of its invention.



The '723 patent is directed to reinforcing plates for use on a wood sill (e.g., of a building frame) to provide a reinforced anchoring location for receiving an anchor bolt protruding from a concrete foundation. Abstract, Col. 2, lines 57-60. Frame residential houses are typically tied to their foundation by attaching a lowermost wood sill of the house frame to foundation anchor bolts. Col. 1, lines 8-12. In earthquake conditions, the house is held to the foundation only through attachment to these bolts. Col. 1, lines 26-30. A problem of the prior art occurred under earthquake conditions which caused a foundation (and its anchor bolts) to shift. As the anchor bolts shift they could slice through the house's wood sill, causing the building to break free from the foundation. Id.

The '723 patent addresses this problem through use of reinforcing plates having gripper prongs with sharp points to slice into and firmly grip opposite sides of the wood sill. Summary of the Invention, Col. 1, lines 45-49. The foundation anchor bolt is received through a plate central opening 22. Col. 2, lines 62-66. If the anchor bolt shifts during an earthquake, the bolt will then engage the edge of the reinforcing plate opening 22 instead of the wood sill sidewall. Summary of the Invention, Col. 2, lines 4-30. The '723 patent teaches that this configuration results in a much improved load transfer from bolt to wood that reduces risk of the wood sill splitting. Col. 2, lines 18-30.

The '723 patent specifically teaches that the sharp-pointed gripper prongs 14 improve over configurations that introduced "crushing" engagement with the sill: "... Standard washers need to crush down into the wood to restrain whereas the present invention does not ... since the gripper prongs transfer the load." Col. 4, lines 28-33. Accordingly, the

thin blade-like shape and sharp points on the gripper prongs of the '723 patent are important to the intended purpose of its invention: to firmly anchor the plate in the sill by slicing into it while avoiding "crushing" engagement that can result using washers or the like. One considering the '723 patent would therefore not be led to the shapes required by claims 37 and 39: a generally hemispherical shape.

The claimed hemispherical shapes of claims 37 and 38 do not have the "sharp point" that the '723 patent teaches is important to its gripper prongs. Further, the claimed hemispherical shape would be expected to provide reduced gripping power of the wood sill verses the sharp pointed gripper prongs 14, and further would be expected to apply some crushing engagement on the wood sill as they were forced downward into it (due to their shape and lack of a sharp point). The '723 patent expressly teaches away from such engagement. Col. 4, lines 28-33. For these reasons it is submitted that the '723 patent fails to disclose or suggest the hemispherical shaped anti-rotation elements of claims 37 and 38, and in fact teach away from the claimed structure. The obviousness rejections of claims 37 and 38 must therefore be reversed.

Finally, it is noted that the ground of this rejection were previously put forth to reject the same elements of other claims but was subsequently withdrawn (see, for example, the Appeal Brief filed on November 27, 2007). It is submitted that in making this rejection the Examiner takes an inconsistent position with previous prosecution. Again, this is disappointing given the extensive and costly prosecution history of this application.

### **III. CLAIM 37 IS DEFINITE**

Claim 37 has been rejected as indefinite under §112, second paragraph. Claim 1 recites that the anti-rotation elements have one of a generally hemisphered or a truncated cone shape. Claim 37 depends from claim 1 and recites that the elements have a generally hemispherical shape. The Final Action states: “Claim 37 is rejected to (sic) because it is not clear which shape of anti-rotation element as applicant is now claiming a generally hemispherical shape. As previously rejected, the Examiner used a generally truncated hollow cone shape in the previous action.” Page 2. This rejection is not clear, is not well-founded, and is improper. It is submitted that claim 37 is definite.

### CONCLUSION


For the foregoing reasons, Applicants respectfully request that the rejection of claims 32, 35, 36, 37 and 38 be reversed. Reversal of the rejections of these claims is called for based on at least the following reasons:

1. The sharp pointed gripper prongs of the '723 patent do not have the hemisphered shape required by claims 37 and 38, and in fact the '723 patent teaches away from this claimed structure.
2. The '185 patent fails to teach or suggest a resilient cover as claimed in claims 32, 35 and 36, and insufficient evidence of a motivation to combine or modify the reference has been put forth.
3. Claim 37 satisfies 35 U.S.C. §112.

Respectfully submitted,

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## **CLAIMS APPENDIX**

1. (Previously Presented) A rod hanger for attachment with a fastener to a substrate when the fastener is driven into the substrate and frictionally held in the substrate, the rod hanger for securing a rod to the substrate, comprising:

a mounting portion defining a perimeter edge, having generally planar top and bottom surfaces, said generally planar top surface configured for engaging the substrate that the fastener is driven into and that frictionally holds the fastener and having a hole extending between said top and bottom surfaces configured for engaging the fastener;

a rod receiving portion configured for threadably receiving the rod;

a connecting element configured for vertically displacing said mounting portion and said rod receiving portion; and

at least four anti-rotation elements on said mounting portion generally planar top surface spaced apart from said hole, spaced apart from said perimeter edge and configured for penetratingly engaging the substrate that the fastener is driven into and that frictionally holds the fastener in place and for counteracting a moment acting upon said rod hanger as the rod is threadably received by said rod receiving portion, said anti-rotation elements having one of a generally hemisphered shape and a generally truncated hollow cone shape.

2. (Previously Presented) The rod hanger of claim 1, wherein said rod receiving portion defines a generally planar shape.

3-7. (Canceled)

8. (Previously Presented) The rod hanger of claim 1, wherein said rod receiving portion includes a lip formation disposed about said hole and configured to threadably engage the rod.

9-11. (Canceled)

12. (Original) The rod hanger of claim 1, wherein said rod hanger defines a unitary body with a generally uniform thickness.

13-25. (Canceled)

26. (Previously Presented) The rod hanger of claim 1 wherein said mounting portion defines a plane, said hole defines a circumference of  $360^\circ$ , and wherein said at least four anti-rotation elements are disposed along said plane uniformly from said hole and spaced from one another by about  $90^\circ$  along the circumference of said hole.

27-31. (Canceled)

32. (Previously Presented) The rod hanger of claim 36 and wherein said resilient cover is formed of a polymer and extends fully over said anti-rotation member, and is secured to said anti-rotation members by one of a chemical adhesive or thermoforming.

33. (Previously Presented) The rod hanger of claim 1 wherein said hole extending between said mounting portion top and bottom surfaces is defined by a substantially smooth sidewall.

34. (Previously Presented) The rod hanger of claim 1 wherein the fastener has a shaft portion, and wherein said hole extending between said mounting portion top and bottom surfaces has a diameter substantially larger than the shank portion and is thereby configured to allow the shank portion to pass freely therethrough.

35. (Previously Presented) A rod hanger for attachment with a fastener to a substrate when the fastener is driven into the substrate and frictionally held in the substrate, the fastener including a shank portion, the rod hanger for securing a rod to the substrate, comprising:

a mounting portion defining a perimeter edge, having generally planar top and bottom surfaces, said generally planar top surface configured for engaging the substrate that the fastener is driven into and that frictionally holds the fastener, having a hole extending between said top and bottom surfaces configured for engaging the fastener, said hole defined

by a smooth sidewall and having a diameter substantially larger than said fastener shank portion configured to allow the shank portion to pass freely therethrough;

a rod receiving portion configured for threadably receiving the rod;

a connecting element configured for vertically displacing said mounting portion and said rod receiving portion;

at least four anti-rotation elements on said mounting portion generally planar top surface spaced apart from said hole, spaced apart from said perimeter edge and configured for engaging and penetrating the substrate that the fastener is driven into and that frictionally holds the fastener in place and for counteracting a moment acting upon said rod hanger as the rod is threadably received by said rod receiving portion; and,

a resilient cover formed of a polymer extending fully over said at least four anti-rotation members for enhancing the adhesion of the mounting portion with the substrate; said resilient cover secured to said anti-rotation members by one of a chemical adhesive or thermoforming.

36. (Previously Presented) A rod hanger for attachment with a fastener to a substrate when the fastener is driven into the substrate and frictionally held in the substrate, the rod hanger for securing a rod to the substrate, comprising:

a mounting portion defining a perimeter edge, having generally planar top and bottom surfaces, said generally planar top surface configured for engaging the substrate that



the fastener is driven into and that frictionally holds the fastener and having a hole extending between said top and bottom surfaces configured for engaging the fastener;

a rod receiving portion configured for threadably receiving the rod;

a connecting element configured for vertically displacing said mounting portion and said rod receiving portion; and,

at least four anti-rotation elements on said mounting portion generally planar top surface spaced apart from said hole, spaced apart from said perimeter edge and configured for penetratingly engaging the substrate that the fastener is driven into and that frictionally holds the fastener in place and for counteracting a moment acting upon said rod hanger as the rod is threadably received by said rod receiving portion, and further including a resilient cover for enhancing the adhesion of the mounting portion with the substrate.

37. (Previously Presented) The rod hanger of claim 1, wherein said anti-rotation elements have a generally hemispherical shape.

38. (Previously Presented) The rod hanger of claim 36, wherein said anti-rotation elements have a generally hemispherical shape.

39. (Withdrawn) The rod hanger of claim 1, wherein said anti-rotation elements are formed by stamping wherein they have a closed end.

## **EVIDENCE APPENDIX**

None.

## **RELATED PROCEEDINGS APPENDIX**

None.